



PRIORITY ENERGY, LLC

186 IBLA 363

Decided December 23, 2015



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Interior Board of Land Appeals
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PRIORITY ENERGY, LLC

IBLA 2013-142

Decided December 23, 2015

Appeal from a decision of the Director, Bureau of Indian Affairs, denying its appeal of an Order to Report and Pay Additional Royalties, issued by the Office of Natural Resources Revenue, requiring appellant to report and pay additional royalties to the Ute Mountain Ute Tribe, with respect to the production of natural gas from four onshore Indian oil and gas leases. MMS-10-0058-IND; Case No. 07-00191.003.

Motion for hearing denied; decision affirmed.

1. Indians: Mineral Resources: Oil and Gas: Royalties--Oil and Gas Leases: Royalties: Generally

ONRR properly requires an Indian oil and gas lessee to pay additional royalties calculated on the basis of natural gas measurements made at the wellhead on the lease, rather than at an off-lease measurement point previously approved by BLM, where the record establishes that the off-lease measurement point was not in effect at the time of the production at issue.

2. Indians: Mineral Resources: Oil and Gas: Royalties--Oil and Gas Leases: Royalties: Generally

ONRR is not precluded by the contractual limitations in a minerals agreement entered into by an Indian oil and gas lessee and an Indian tribe, which had been approved by the Secretary of the Interior, from requiring the lessee to pay additional royalties owed on natural gas production more than 72 months after the submittal of each monthly royalty accounting to the tribe and BIA, absent the timely filing of a specific exception by the tribe or BIA, because the contractual preclusion of the collection of any additional royalty after that time frame was binding on the tribe, but not ONRR, since it was not a party to the agreement.

3. Estoppel--Indians: Mineral Resources: Oil and Gas: Royalties--Oil and Gas Leases: Royalties: Generally

An Indian oil and gas lessee is not entitled to avoid paying additional royalties owed on production prior to the effective date, as between the parties, of the assignment, by which it acquired the lease, because it agreed to the assignment under the good faith belief that the assignor had paid all the royalties properly deemed to be owed on production. Nor is ONRR equitably estopped from collecting the additional royalties owed where there is no evidence that the lessee relied on an affirmative written misrepresentation or concealment of material fact by ONRR, regarding the status of the royalty account, at the time of approval of the assignment, and where, in any event, allowing the lessee to avoid its royalty obligation would afford it a right not authorized by law.

4. Indians: Mineral Resources: Oil and Gas: Royalties--Oil and Gas Leases: Royalties: Generally

ONRR is not bound by the terms of a private agreement, pursuant to which the prior holder of an Indian oil and gas lease assigned the lease to the current holder, in determining the party properly held to be responsible for paying royalties owed to the United States, acting on behalf of an Indian tribe. The applicable regulation and the assignment approved by BIA place the obligation to pay any additional royalties that accrued during the period of time that the lease was held, with the approval of BIA, by the prior holder of the lease on the current holder of the lease, upon the effective date of the assignment, at the time of its approval by BIA.

5. Indians: Mineral Resources: Oil and Gas: Royalties--Oil and Gas Leases: Royalties: Generally

The Board will deem ONRR to have properly computed the additional royalties owed with respect to natural gas produced from an Indian oil and gas lease where the lessee fails to establish, by a preponderance of the evidence, any error in the royalty computation. The lessee fails to

establish any error in ONRR's decision to use the higher of the production recorded by the lessee at the wellhead and the production reported by the lessee on the applicable government form in determining the amount of natural gas produced from each of the wells on the lease, where no evidence is presented demonstrating that the production volumes were not accurately recorded or reported, the higher figure did not represent actual production, or ONRR otherwise violated its obligation to ensure the greatest return to the tribe for production from Indian lands.

APPEARANCES: J. Maxwell Beatty, Esq., Houston, Texas, for appellant; Charles A. Armgardt, Esq., Albuquerque, New Mexico, for intervenor, J Thomas Development of NM, Inc.; Karen Brown, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., and John R. Kunz, Esq. and Lance C. Wenger, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for Office of Natural Resources Revenue.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Priority Energy, LLC (Priority), has appealed from an October 18, 2012, decision of the Director, Bureau of Indian Affairs (BIA), MMS-10-0058-IND, denying its appeal of a May 4, 2010, Order to Report and Pay Additional Royalties (Order to Report), Case No. 07-00191.003, issued by the Office of Natural Resources Revenue (ONRR).¹ The Order to Report required Priority to report and pay additional royalties, in the total amount of \$320,897.85, to the Ute Mountain Ute Tribe (Tribe), with respect to the production of natural gas from four onshore Indian oil and gas leases (Leases), over the period from August 1, 2000, through September 30, 2009. Because Priority has failed to establish any error of fact or law in ONRR's determination to require it to report and pay additional royalties, we will affirm the Director's October 2012 decision, denying its appeal from ONRR's May 2010 Order to Report.

¹ ONRR's royalty collection responsibilities formerly were assigned to the Minerals Management Service (MMS), and later to the Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE). See 75 Fed. Reg. 61051, 61052 (Oct. 4, 2010). References herein to ONRR refer to MMS, BOEMRE, or ONRR, as appropriate.

I. Background

The Leases encompass Indian tribal lands in the Basin Dakota Gas Field of the San Juan Basin, in San Juan County, New Mexico, within the Ute Mountain Ute Indian Reservation.² They were originally issued by the Tribe to the Wintershall Petroleum Corporation (WPC), pursuant to the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396a-396g (2012), in accordance with an October 1, 1984, Minerals Agreement, which was entered into between WPC and the Tribe, pursuant to the Indian Minerals Development Act of 1982 (IMDA), 25 U.S.C. §§ 2101-2108 (2012). Both the Leases and Minerals Agreement were entered into by WPC and the Tribe, with the approval of the Secretary of the Interior, acting through BIA. *See generally Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1180-81 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1557 (2012). The Leases were later assigned from WPC to JTD, with the approval of the Tribe and BIA, effective January 1, 2001.

Thereafter, JTD and Priority, as “Seller” and “Purchaser,” respectively, entered into a Purchase and Sale Agreement (Purchase Agreement) (attached as Ex. B to Notice of Appeal/Statement of Reasons (NA/SOR)) on February 19, 2008, under which JTD agreed to sell and convey and Priority agreed to purchase and accept the Leases, subject to the terms and conditions of the Agreement.³ *See* Purchase Agreement, §§ 1.1 and 1.2, at 1. The Agreement provided that JTD and Priority “shall execute immediately following the execution of this Agreement the necessary Indian lease assignments,” and submit them to the Tribe and BIA “for the necessary consent and

² The Leases, issued Oct. 1, 1984, Aug. 11, 1987, and Sept. 29, 1988, were originally designated as Mining Lease Contract Nos. M00-C-1420-4387, M00-C-1420-4388, M00-C-1420-4389, and 751-88-0001 (later renumbered, respectively, Nos. 524-004387-0, 524-004388-0, 524-004389-0, and 524-880001-0). They encompass a total of 2,555.88 acres of Indian tribal land in T. 31 N., R. 14 W., New Mexico Principal Meridian, San Juan County, New Mexico. J Thomas Development of NM, Inc. (JTD) reports that seven wells (Ute Mountain Ute Nos. 27-22Y, 27-44, 28-43, 33-14, 33-33, 34-11, and 34-44) (Wells) were drilled by the then lease operator (BASF Corporation (BASF)) “about 1991,” and subsequently produced, resulting in the royalty computations now at issue. Answer at 3. The seventh well (No. 34-44) was not listed in the text of JTD’s Answer, but is reflected in Exhibit (Ex.) 6 to the Answer.

³ NM Towers, Inc., executed the Purchase Agreement along with JTD. For ease of reference in connection with the present appeal, we refer to the Agreement as between JTD and Priority.

approval.” *Id.*, § 4.3, at 5. With respect to each of the Leases, JTD and Priority also executed an “Assignment of Mining Lease” (Assignment) from JTD to Priority. The Assignment provided that, by accepting the assignment, which was subject to the approval of the Secretary, Priority “agree[d] to fulfill all the obligations, conditions, and stipulations in said described indenture of lease, when assigned, and the rules and regulations of the Secretary of the Interior applicable thereto[.]” It also stated that the assignment was “to be effective from date of approval of the Secretary of the Interior or his authorized representative.”

On November 10, 2009, the Tribe approved an “Assignment of Oil and Gas Leases and Amendment to Minerals Agreement/Leases” (Assignment/Amendment), which had been jointly executed by the Tribe and Priority. Under the Assignment/Amendment, the Tribe approved the assignment of the Leases to Priority, and the Tribe and Priority agreed to amend the Leases and the Minerals Agreement, concerning continuous a drilling obligation and other aspects of the leasing arrangement, effective on the date of BIA’s approval of the Assignment/Amendment. Further, Section 102 of the Assignment/Amendment provided that, “[u]pon the approval of this Agreement by [BIA], Priority shall assume all of the obligations of the assignor, *including obligations unfulfilled as of the effective date of the assignment.*” Assignment/Amendment at 3 (emphasis added).

On January 11, 2010, BIA approved the Assignment/Amendment and the Assignment of each lease.

On February 13, 2010, ONRR issued an Order to Report to JTD, requiring JTD to pay additional royalties in the total amount of \$318,433.81. Answer, Ex. 8. JTD made no payment. On May 4, 2010, ONRR issued Priority the Order to Report, now on appeal, requiring Priority to report and pay additional royalties.⁵ ONRR required Priority, as the successor-in-interest to JTD, to pay the additional royalties deemed to be owed by JTD. Based on recomputations, ONRR concluded that JTD had under-reported gas produced from the Leases and underpaid royalties over the production period from August 2000 through September 2009.

⁵ ONRR stated that the Order to Report was not based on an audit, but rather its analysis of production and other information provided by JTD, noting that it might, in the future, conduct an audit in order to, *inter alia*, “verify . . . the accuracy of the underlying volumes, production valuation, and supporting cost information.” Order to Report at 2.

ONRR detailed its royalty recomputations in Enclosures 1, 2, and 3, attached to the Order to Report. Enclosures 2 and 3 refer, respectively, to the production period from August 2000 through March 2003, and from April 2003 through September 2009. For each production month, ONRR began its analysis with an “Audited Gas Volume” or “Reviewed [Gas] Volume,” which represented the production for each producing well or wells in the lease area determined during a prior audit or review of JTD’s royalty accounts by the Tribe.⁶ It then compared the Audited or Reviewed Gas Volume against a “Restated Wellhead Volume,” which was generally calculated by taking the production volume (expressed in terms of thousand cubic feet (Mcf)) recorded at the wellhead meter or meters reported by R&L Chart Service, Inc., on behalf of JTD, multiplied by the wellhead Btu factor determined by Gas Analysis Service, on behalf of JTD.⁷ In the case of each production month, ONRR compared the Audited or Reviewed Gas Volume and Restated Wellhead Volume for each producing well or wells, adopted the “Highest” of the two volumes as the “Royalty Volume,” for royalty computation purposes, and then subtotaled the Royalty Volume for all producing wells in that month. It then calculated a “Sales Value” for each production month, based on the subtotaled Royalty Volume. ONRR then used the Sales Value to calculate a “Royalty Value,” given the 20% royalty rate, under the Leases.

ONRR determined whether JTD had overpaid or underpaid royalties for the production month, by comparing the Royalty Value with the “Royalty Paid.” JTD failed to remit payment, in response to ONRR’s February 13, 2010, Order to Report, and ONRR considered the total additional royalties owed, \$320,897.85, an “unfulfilled” obligation, which Priority had “assume[d],” in accordance with the Lease assignments, effective, when approved by BIA, January 11, 2010. Order to Report at 1; Enclosure 1. ONRR set June 8, 2010, as the deadline for reporting and paying the total additional royalties.

⁶ In the case of the production months from August 2000 through June 2008, ONRR used the volumes from the Tribe’s prior audit or review. However, in the case of the production months from July 2008 through September 2009, it used the volumes reported by JTD on its MMS-2014 forms, instead of the volumes from the Tribe’s prior audit or review.

⁷ With respect to production months from August 2000 through December 2000, ONRR did not have wellhead meter volumes, and used the volumes from the Tribe’s prior audit as the basis for calculating the Restated Wellhead Volumes.

On June 4, 2010, Priority appealed the Order to Report, pursuant to 30 C.F.R. § 290.105 (2009), arguing that, as a matter of equity, it should not be held liable for royalties with respect to the production of gas from the Leases from August 2000 through September 2009, a period prior to the effective assignment of the Leases, because: (1) JTD was liable for such royalties; (2) Priority was never notified of JTD's outstanding liability from royalties deemed to be owed; (3) JTD's failure to pay such royalties accrued to the benefit of JTD, not Priority; and (4) liability for such royalties would impair Priority's ability to develop and produce the Leases.

In his October 2012 decision, the Director denied Priority's appeal, concluding that Priority assumed JTD's "unfulfilled [royalty] obligation," including the additional royalties on production from August 2000-September 2009, as of the assignment approval date--January 11, 2010, explaining, as follows:

The regulation at 25 C.F.R. § 211.53(c) (2000) provides that an "assignee accepts all the assignor's responsibilities and prior obligations and liabilities of the assignor (including, but not limited to any underpaid royalties and rentals)." In addition, the lease assignment and amendment between Priority and [the Tribe] . . . states that "Priority shall assume all of the obligations of the assignor, including obligations unfulfilled as of the effective date of the assignment." Assignment of Lease and Amendment § 102 The lease assignment and agreement do not contain any exclusions from Priority's assumption of *all* of the obligations of the assignor.

Decision at 2-3. The Director found Priority's equity arguments irrelevant to the issue of Priority's liability to ONRR, suggesting they are more properly addressed to JTD "as a matter of indemnification or contribution." *Id.* at 3.

Priority appealed timely to the Board. It asks the Board to reverse the May 2010 Order to Report, or modify the Order, to decrease the amount owed. JTD filed an "Answer," advancing its own reasons for challenging ONRR's royalty assessment. Answer at 2, 10.

Before addressing Priority's appeal from the Director's October 2012 decision, affirming ONRR's May 2010 Order to Report, we note that, in its Answer, JTD does not respond to Priority's NA/SOR, but rather directly challenges ONRR's requirement to report and pay additional royalties with respect to the production of gas from the Leases, over the period from August 2000 through September 2009. Thus, it basically asserts that "the [May 2010] Order should be reversed or [substantially] modified because royalties were not underpaid[.]" Answer at 2. It thus generally supports Priority's reasons, but really advances its own reasons, for challenging ONRR's royalty

requirement.¹⁰ *See id.* at 10 (“The Order should be reversed or substantially modified based upon the SOR of Priority, and this Answer”).

JTD, which intervened in the appeal, raised a number of objections to ONRR’s decision that should be addressed at the outset.

II. Discussion

A. JTD’s Objections

JTD seeks reversal or substantial modification of the Director’s October 2012 decision affirming ONRR’s May 2010 Order to Report. JTD specifically challenges ONRR’s determination that royalties remain due and owing with respect to the August 2000-September 2009 production from the Leases. JTD is concerned that Priority, by focusing on appeal on “whether Priority should bear liability for the alleged \$320,897.85 royalty underpayment,” fails to give “substantial attention . . . to whether the claim for the \$320,897.85 was proper *in the first instance*.” Answer at 5 (emphasis added). JTD asserts that ONRR’s May 2010 Order to Report, whether directed at Priority or JTD, was “erroneous on at least three grounds,” as follows: (1) ONRR, in recomputing the royalties deemed to be owed on production from the Leases, failed to rely on gas measurements at the off-lease measurement (OLM) point approved by the Bureau of Land Management (BLM) in 1992, and in effect thereafter; (2) ONRR’s requirement to pay additional royalties owed on production during the entire period from August 2000 through September 2009 violates, in substantial part, the contractual limitations, in the Minerals Agreement, effectively precluding any challenge to a monthly royalty account more than 72 months after submittal of the

¹⁰ In a July 18, 2013, Order, we took a motion by JTD for a hearing, pursuant to 43 C.F.R. § 4.415, under advisement. *See* JTD Answer at 10. However, we now conclude that JTD has identified no “issue[] of material fact” that would, “if proved, . . . alter the disposition of the appeal,” and no “[s]ignificant factual or legal issue[]” that “remain[s] to be decided” and that “the record without a hearing would be insufficient for resolving,” thus “requir[ing] a hearing,” under 43 C.F.R. § 4.415. *See id.* (“[I]nsofar as the Board determines that there are issues of fact which must be resolved prior to reversal or modification of the Order, JTD hereby moves the Board to refer the case to an administrative law judge for hearing to determine those fact issues” (emphasis added)); *e.g.*, *Larry Smith d/b/a Top Gun Outfitters*, 183 IBLA 321, 331-32 (2013). Accordingly, we will deny the motion.

monthly royalty accounting statement to the Tribe and BIA;¹¹ and (3) ONRR is precluded, as a matter of equity, from requiring the payment of additional royalties, by reason of JTD's longstanding reliance on BLM's 1992 approval of OLM, which was not disputed by the Tribe for 17 years and was even officially accepted by the Tribe in 2010, and, later, when Priority entered the picture, by reason of the Tribe's affirmative concealment from Priority of its acceptance of the BLM-approved OLM, as the basis for royalty computation. Answer at 2; *see id.* at 6-10.

In addressing JTD's arguments, we will resolve whether any party to this appeal, either Priority or JTD, is liable for the additional royalties.

1. *Whether ONRR Failed to Take OLM into Account
in Computing Additional Royalties Owed*

JTD argues that ONRR's May 2010 Order to Report was erroneous because, in recomputing the royalties deemed to be owed on production from the Leases, ONRR failed to rely on gas measurements at the OLM point approved by BLM in 1992, and in effect thereafter.¹² It asserts that, in 1992, BLM gave its "express written approval" of the OLM point for the Wells at issue. Answer at 2. JTD therefore concludes that, since ONRR measured the production volumes, for royalty valuation purposes, at the wellhead, ONRR's calculation of production volumes, and thus its royalty valuation (and computation), were in error. *See id.* at 6-8.

JTD asserts that, at the time of drilling the Wells in 1991, WPC's operator (BASF) requested of BLM, which administered the Leases, "permission to *combine production for off-lease/pad gas measurement* and sales based on economic necessity."¹³ Answer at 3 (quoting Sundry Notices and Reports on Wells (Form 3160-5

¹¹ In filing its Reply to ONRR's Answer, Priority joined in JTD's assertion that ONRR was contractually barred from seeking additional royalties that accrued prior to May 2004. *See* Reply at unpaginated (unp.) 6-7.

¹² "For . . . oil and gas operations[,] . . . BIA has adopted BLM regulations and has given BLM authority to enforce them. 25 C.F.R. §§ 211.4 (IMLA leases), 225.4 (IMDA agreements). The BLM regulations, codified at 43 C.F.R. Part 3160, apply to all oil and gas operations on both [F]ederal public lands and [Indian] tribal lands. 43 C.F.R. § 3161.1(a)." *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d at 1181 n.10.

¹³ In effect, JTD sought BLM's permission not only to commingle production from the various wells in its gathering system, but also to measure the commingled gas at an OLM point. *See* 43 C.F.R. §§ 3161.1(a) and 3162.7-3 ("Off-lease measurement or

(continued...)

(November 1983)) (Sundry Notices), dated Apr. 14, 1991 (Ex. 3 to Answer)), emphasis added; Sundry Notice (Well No. 34-44), dated Apr. 14, 1991 (part of Ex. 6 to Answer). It notes that, in the Sundry Notices, BASF explained that the gas produced from each of the wells was initially measured by BASF at the wellhead (allocation meter), and then, since the pipeline companies would not lay pipelines to the wellheads, the gas was combined and transported by BASF's pipeline to the purchaser (Western Gas Processors, Ltd. (WGP)), where it was measured by BASF (check meter) and immediately thereafter by WGP (sales meter). See, e.g., *Robert L. Bayless*, 138 IBLA 210, 211-12, 218-19 (1997). Each of the Sundry Notices referred to an attached map on which were depicted the well locations, lease boundaries, pipeline routes, and sales meter location. The attached map depicted the seven Wells drilled in the case of the four Leases, all of which were linked together, by pipelines, into a gathering system. The sales meter location was not depicted, but the general direction of the flow of gas to that location was indicated.

JTD now states that, for royalty computation purposes with respect to each well, WPC used the total volume measured at WGP's sales meter, confirmed by BASF's check meter, as allocated back to each of the wells, based on the proportion of total production recorded at the wellheads attributable to each well, as determined by the allocation meters. JTD describes the off-lease central point of delivery (CPD), where the gas from all the wells was combined and measured, as the OLM point, for royalty computation purposes.¹⁴

(...continued)

commingling with production from other sources prior to measurement may be approved by the authorized [BLM] officer") (2009); *Devon Energy Production Company, L.P.*, 176 IBLA 396, 407-08 (2009) (citing *Byron Oil Industries, Inc.*, 161 IBLA 1, 5 (2004)). "BLM is responsible for the accuracy of the volumes which are reported by operators to [ONRR] for royalty computation purposes and thus is obligated to see that those volumes accurately reflect the quantity of oil and gas taken from the Federal [or Indian] wells and eventually sold." *Devon Energy Production Company, L.P.*, 176 IBLA at 408. Thus, "before affording . . . approval [under 43 C.F.R. § 3162.7-3 (2009)], BLM must be assured that any [OLM] of production, following commingling, is properly allocated back to the lease, thus accurately accounting for lease production," since a lessee "must account for royalty on a lease basis." *Byron Oil Industries, Inc.*, 161 IBLA at 5 (quoting *Enron Oil & Gas Co.*, 122 IBLA 224, 241, 99 I.D. 20, 29 (1992)).

¹⁴ JTD states that some of the combined gas at the CPD was "used to fuel the compressor" at that point, thus rendering the total volume of gas measured at the CPD

(continued...)

JTD states that BASF renewed its request in 1992, submitting similar Sundry Notices. *See Answer at 4* (citing Sundry Notices, dated May 8, 1992 (Ex. 4 to Answer)). Each of the Sundry Notices referred to an attached map on which was depicted the well locations, lease boundaries, pipeline routes, and sales meter location. The attached map depicted the seven Wells drilled in the case of the four Leases, all of which were linked together, by pipelines, into a gathering system. The sales meter location, at the end of the main gathering line from the Wells, was depicted.

JTD asserts that BLM granted BASF permission to commingle and use the CPD as the OLM point, for royalty computation purposes. *See Answer at 4* (citing Approved Sundry Notices (Ex. 6 to Answer)). It states that such approval occurred “in May 1992,” with BLM’s execution of the Sundry Notices. *Id.* JTD provides additional evidence that, after ONRR issued its February 13, 2010, Order to Report, JTD provided the Tribe with copies of BLM’s approval of the Sundry Notices, thus informing the Tribe that it had approval to use OLM, for royalty computation purposes. *See id.* at 4-5 (citing FAX to Terence D. Fisher, Director/Principal Investigator, Ute Mountain Ute Mineral Audit Department, Tribe, from W. Jeff Holcomb, Holcomb Oil and Gas, Inc., JTD’s Consultant, dated Apr. 13, 2010, of Approved Sundry Notices, dated Apr. 14, 1991 (Well No. 33-14), and May 8, 1992 (Well No. 33-14) (Ex. 9 to Answer); and FAX to Fisher from Holcomb, dated June 16, 2010, of Approved Sundry Notices, dated May 8, 1992 (Well Nos. 27-22Y and 33-14), and Apr. 14, 1991 (Well Nos. 27-44, 28-43, 33-33, and 34-11) (Ex. 10 to Answer)).

JTD notes, however, that the Tribe responded to notification of BLM’s approval of OLM, for royalty computation purposes, stating that the new information “does not change the Tribe’s position” regarding royalty computation, since it did not establish that any of the gas produced from the Wells was, in accordance with 30 C.F.R. § 202.555(a) (2009), not royalty-bearing.¹⁵ Memorandum to Holcomb from Fisher,

(...continued)

sales meter “less than the sum of the volumes measured at the Wellhead meters.”
Answer at 4.

¹⁵ The Tribe reported that 30 C.F.R. § 202.555(a) (2009) provided, in pertinent part, that “[a]ll gas produced from . . . your Indian lease is subject to royalty,” subject to certain exceptions (unavoidably lost gas, gas used on or for the benefit of the lease, gas used off-lease for the benefit of the lease when BLM approves such off-lease use, and gas used as fuel for a processing plant) that were not applicable. Memorandum to Holcomb from Fisher, dated Aug. 2, 2010 (Ex. 11 to Answer), at 1 (emphasis added).

dated Aug. 2, 2010, at 1. In effect, the Tribe stated that it did not matter whether the gas was measured at the wellhead or off-lease, since the quantity was the same, for royalty computation purposes. JTD further notes that it rejected the Tribe's application of 30 C.F.R. § 202.555(a) (2009), indicating that, as "part of the approved off lease measurement process," BLM had approved the allocation of production measured at the CPD sales meter to the individual wells, after deduction of the costs of compression, rendering such costs not royalty-bearing: "The approved off-lease applications by the BLM detailed production allocation methodology, allocated lease gas used by separators/scrubbers[] [and] compression, and the schematic of gas flow from wellhead to sales meter." Letter to Fisher from Holcomb, dated Aug. 5, 2010 (Ex. 12 to Answer), at 3.

In its Answer, JTD reiterates its position that compression gas is not royalty-bearing, indicating that, in approving OLM, BLM meant to render only the gas measured at the sales meter liable for royalty, thus excluding gas used, prior to the sales meter, for compression:

[W]hen the BLM approved of OLM for the Wells at issue, it recognized that the gas used in the CPD compressor was for the benefit of the Leases and therefore the volumes recorded at the OLM point at the CPD are the correct volumes on which to pay royalty. . . . [W]here 30 C.F.R. § 202.555 [(2009)] states an obligation to pay royalty on "allocated" volumes, and where JTD complied with this by paying royalty on the sales meter volumes "allocated" back to the individual Wells, no further royalties are due.

Answer at 6 (emphasis added). In effect, JTD maintains that, in approving OLM for gas produced from the Leases, BLM approved the use of gas for compression, as an off-lease use beneficial to the Leases, in accordance with 30 C.F.R. § 202.555(a) (2009).

Finally, JTD states that, following approval of the Sundry Notices, gas was measured, for royalty computation purposes, in accordance therewith, for approximately 17 years, thus encompassing the August 2000-September 2009 production period now at issue, since there is no evidence that the approved Notices were ever revoked, rescinded, or modified. See Answer at 4 ("The parties then performed consistent with the BLM-approved OLM for approximately seventeen years, without issue").

We do not doubt the importance of a proper gas measurement point in the proper calculation of royalties owed on gas production. See *Robert L. Bayless*, 143 IBLA 267, 271 (1998). And we agree with JTD that, in *Bayless*, the Board held that BLM could not order the operator "to radically change the manner in which it

measured volume production,” for royalty computation purposes, in view of “the continuing legal efficacy of the approved off-lease [measurement] plan,” which had been approved, and never revoked, rescinded, or modified, by BLM. Answer at 7 (quoting *Robert L. Bayless*, 143 IBLA at 272 (citing *Robert L. Bayless*, 138 IBLA at 222)). However, we are not persuaded that, in the present case, ONRR changed the manner of measurement, undoing the OLM system long approved by BLM, or, even if it did, that this prejudiced JTD or its successor-in-interest (Priority).

ONRR does not dispute the fact that BLM approved OLM in 1992, but asserts that this authorization ended, in accordance with Conditions of Approval (COA) incorporated in the approved Sundry Notices, on May 27, 1996, and thus did not carry over during the August 2000-September 2009 production period at issue. See Answer at 6. It cites the Declaration (Decl.) of Barbera J. Rosenbaugh, Director/Principal Investigator, Ute Mountain Ute Mineral Audit Department, Tribe, dated Aug. 10, 2015 (Ex. E to Answer), and the attached Exhibit 1 (Letter to Rosenbaugh from Dan Rabinowitz, Petroleum Engineer, Tres Rios (Colorado) Field Office, BLM, dated July 17, 2015). Rosenbaugh reports that, on July 15, 2015, she inquired of Rabinowitz “regarding Off-Lease Measurement (OLM) Approvals for the leases and wells related to [ONRR] Case No. 07-00191.003, and was informed by him, in his July 17, 2015, letter, that, in accordance with the COAs, “*OLM was not authorized for the wells in the gathering system from May 27, 1996[,] to March 14, 2012,*” and thus, “[d]uring this 16 year period, the Operators of the wells were required to report and pay royalties based upon wellhead production and not from the C[PD].”¹⁶ Rosenbaugh Decl., ¶¶ 15, 16, at unp. 3 (quoting Letter to Rosenbaugh from Rabinowitz, dated July 17, 2015, at 2).

¹⁶ Rabinowitz stated, at page 1 of his July 17, 2015, letter, that BLM had originally approved a 1991 Sundry Notice for Well No. 33-14, which was similarly applicable to all of the other six wells at issue, subject to COAs. He noted that this approved Sundry Notice was “supersede[d]” when BLM approved the 1992 Sundry Notices for the seven wells, subject to COAs, which provided, *inter alia*, that “OLM was granted for a period of four years until *May 27, 1996.*” Letter to Rosenbaugh, dated July 17, 2015, at 2. We note that the letter referred to the “subject oil and gas wells,” which covered only 5 of the 7 Wells at issue, but the statement that OLM was not authorized from May 27, 1996, to Mar. 14, 2012, concerned all the Wells “in the gathering system[.]” *Id.* at 1, 2. Further, Rabinowitz noted that the two remaining wells (Nos. 33-14 and 34-11) “were included in the gathering system and OLM approval,” subject to the same COAs. *Id.* at 2.

JTD challenges Rabinowitz's statement that the OLM approval was not in effect from May 27, 1996, to March 14, 2012, but offers no convincing argument or support to the contrary. See Reply at 1-2. Initially, ONRR did not provide the COAs on which Rabinowitz relied. However, we note that the copies of the 1992 Sundry Notices provided by JTD were stamped "SEE ATTACHED CONDITIONS OF APPROVAL[.]" See Ex. 6 to Answer. Accordingly, the burden fell to JTD to submit the COAs, or otherwise prove that the COAs did not limit the period of time that BLM's 1992 approval of OLM was in effect. In any case, ONRR recently submitted copies of 1992 Approved Sundry Notices, along with its Sur-Reply, for 5 of the 7 Wells (Nos. 27-22Y, 27-44, 28-43, 33-33, and 34-44). Each Notice is stamped "SEE ATTACHED CONDITIONS OF APPROVAL," and attached to each Notice are COAs that specifically state: "Approval is granted until May 27, 1996, at which time a request for extension of this approval will be required." JTD does not dispute that ONRR approved Notices, with the same COAs, with respect to Well Nos. 33-14 and 34-11.

[1] On these facts, we conclude that BLM had not approved OLM for production from the Leases during the August 2000-September 2009 period, and, therefore, the operator was required to measure production *at the wellhead*. See *Robert L. Bayless*, 138 IBLA at 221-22, 222 ("[BLM may rescind approval of OLM, following commingling, or allow such approval to expire since] [a]n operator is not entitled as a matter of right to approval of a surface commingling and [OLM] plan but must satisfy BLM that the plan meets applicable requirements."). ONRR properly requires an Indian oil and gas lessee to pay additional royalties calculated on the basis of natural gas measurements made at the wellhead on the lease, rather than at an off-lease measurement point previously approved by BLM, where the record establishes that the off-lease measurement point was not in effect at the time of the production at issue.

We note, moreover, that, in the present case, even were BLM's approval of OLM in 1992 to have carried over during the August 2000-September 2009 production period at issue, we are not persuaded that the site of gas measurement, whether at the OLM or at the wellhead, would have any bearing on the proper computation of royalty. Even if BLM approved OLM for the Wells in 1992, and such approval carried over to the August 2000 to September 2009 period of production, JTD has not established, and we find no evidence, that ONRR ever approved the use of the production measured at the CPD sales meter, to the exclusion of the amount of production used to compress the gas for sale, for royalty computation purposes. Put simply, we find no evidence that ONRR ever expressly held that *the gas used for compression was **not** royalty-bearing*. BASF, in filing, and BLM, in approving the Sundry Notices in 1992 did not respectively seek and afford anything more than approval to combine production at the CPD sales meter for OLM "measurement and sales" purposes, and the further allocation of this production back to the individual wells, based on the proportion of volumes measured at the allocation meters. BASF did not request, and BLM did not approve, the

exclusion of gas used for compression purposes, prior to the sales meter, from the computation of royalty. Indeed, JTD provides further proof that the gas used for compression purposes would be similarly allocated back to the individual wells, based on the proportion of volumes measured at the allocation meters. See Letter to BLM from Brian Wood, Permits West, Inc., dated May 20, 1992 (Ex. 5 to Answer), at unp. 1.

The rule at 30 C.F.R. § 202.555(a) (2009) provides that gas used off-lease for the benefit of a lease may escape royalty so long as “[BLM] approves such off lease use.”¹⁷ See *Lone Mountain Production Co.*, 139 IBLA 244 (1997) (BLM may decide whether to approve off-lease beneficial use once it approves OLM, where gas used outside lease area for compression purposes). We find no evidence that BLM approved the off-lease use of gas produced from the Wells, in conjunction with compression operations. All BLM approved was off-lease *measurement* of gas produced from the Wells. Indeed, none of the approved Sundry Notices mention any compression of the gas.

In the end, JTD seeks to equate BLM’s approval of measurement of gas off-lease with BLM’s “approv[al] of gas being used off-lease after the Wellhead allocation meters at or near the CPD, and thus the gas so used was royalty-free.”¹⁸ Answer at 5.

¹⁷ The regulatory provision at 30 C.F.R. § 202.555(a) (2009) also provides that “[g]as that is used on, or for the benefit of, the lease” is not subject to royalty. However, we have held that such language does not encompass gas used outside a lease, unitized participating area, or communitized area, for the purpose of compressing the remaining gas, prior to transportation to a processing plant. See *Plains Exploration & Production Co.*, 178 IBLA 327, 329, 330, 340-43 (2010). Therefore, the only exception for which JTD might have qualified was gas used off-lease for the benefit of a lease, but that exception is only available when BLM has approved such off-lease use.

¹⁸ JTD notes that, when the Tribe was informed of BLM’s approval of OLM in the case of one well (No. 33-14), the Tribe is reported to have replied that it had made “appropriate accounting adjustments” for OLM, indicating that it would do so in the case of the other Wells. Answer at 4, 5 (quoting FAX to Fisher from Holcomb, dated June 16, 2010, at unp. 1). Nowhere do we find anything establishing what the Tribe meant by “accounting adjustments,” even assuming that the Tribe actually agreed to make such adjustments. That the Tribe expressly declined to change its royalty computations is clearly reflected in Fisher’s succeeding Aug. 2, 2010, memorandum, replying to Holcomb’s June 16, 2010, FAX. We certainly do not find any indication that the Tribe authorized the use of production measured at the sales meter, to the exclusion of compression gas, for royalty computation purposes.

However, JTD offers no evidence that BLM approval amounted to approval of compression gas as not royalty-bearing. Rather, in proffering Rabinowitz's July 17, 2015, letter, ONRR points to page 2, wherein Rabinowitz stated that, "during the entire timeframe of this discussion [May 27, 1996, to March 14, 2012][,] *none* of the operators of the[] wells [in the gathering system] asked for any gas used or produced to be eligible for the category of Beneficial Use[,], which would reduce the amount of royalties due to the Tribe." *See also XTO Energy, Inc.*, 185 IBLA 219 (2015) (Field compression costs not properly deducted from gas sales revenues, for royalty valuation purposes, where incurred in order to place gas in marketable condition).

Furthermore, with respect to each production month, once the volume of compression gas allocated to production from each well is added to the sales volume allocated to production from each well, the combined amount, which is royalty-bearing, is equal to the original wellhead volume, absent any evidence to the contrary. Therefore, for royalty computation purposes, the volumes of production, whether measured at the OLM point or at the wellhead, remain the same. Viewed in this light, JTD's argument that BLM had approved OLM and that ONRR failed to take this into account, even if demonstrated to be true, is of no effective consequence to the Order and appeal.

Finally, we note that *Bayless*, 143 IBLA 267, cited by JTD, involved a similar gas measurement system to that approved by BLM in 1992, whereby commingled gas from a gathering system was, with BLM's approval, measured at an OLM point, using a sales meter at a CPD, and then allocated back to individual wells, using the wellhead meters. *See* 143 IBLA at 268-69. However, in *Bayless*, the point of measurement was critical to the calculation of royalty, since it was established that there were discrepancies between the volume of gas recorded at each wellhead and the volume of commingled gas recorded at the OLM point as allocated back to each wellhead, and that, while the wellhead meters were of uncertain accuracy, there was no evidence that the sales meters had provided inaccurate reports of production. *See id.* at 272. The Board held that, in such circumstances, BLM could not implicitly change the approved measurement system, effectively penalizing the operator by requiring it to retroactively adjust its past production volumes. *See id.*

In the present case, unlike *Bayless*, there is no evidence that the volume of gas recorded at each wellhead differs or is likely to differ from the volume of commingled gas recorded at the OLM point, as allocated back to each wellhead. Therefore, we do not determine that ONRR has penalized JTD or its successor-in-interest (Priority) by changing the measurement system from OLM to measurement at the wellhead. We find no evidence that a new, different measurement system, even if found to exist, is employed by ONRR "to reap additional royalties from past periods through a retroactive invalidation of an approved off-site measurement system." Answer at 8.

2. Whether ONRR is Contractually Barred from Collecting Additional Royalties

JTD argues that ONRR's May 2010 Order to Report was erroneous because ONRR's requirement to pay additional royalties owed on production during the entire period from August 2000 through September 2009 violates, in substantial part, the contractual limitations, in the Minerals Agreement, effectively precluding any challenge to a monthly royalty account more than 72 months after submittal of the monthly royalty accounting statement to the Tribe and BIA.^{19,20} See Answer at 8-9.

The Minerals Agreement was entered into by WPC, JTD's predecessor-in-interest, and the Tribe. Section 18 of the Agreement, which generally governs accounting and audit procedures, provides, in pertinent part, as follows:

[WPC] shall furnish to the Tribe and the Secretary [of the Interior] monthly statements . . . showing the amount, quality, and value of all oil, gas, natural gasoline, or other hydrocarbon substances produced and saved during the preceding calendar month as a basis upon which to compute the royalty due the Tribe. . . . [WPC] also agrees to comply with all reasonable accounting and audit requirements of the Tribe or the Secretary, provided that *all accounts submitted will be deemed correct unless within seventy-two (72) months after the date of submittal, the Tribe*

¹⁹ ONRR asserts that, in accordance with the U.S. Supreme Court's opinion in *BP America Production Co. v. Burton*, 549 U.S. 84 (2006), "the authority of the United States to pursue [through administrative proceedings] royalties on behalf of an Indian tribe" are not affected by a Federal "statute of limitations[.]" Answer at 5. However, we are now concerned with whether the *Minerals Agreement* placed any contractual limitations on ONRR's requirement to pay additional royalties. That "[p]arties to a contract may require that actions founded on the contract be commenced within a shorter period of time than that prescribed by the applicable statute of limitations," provided the period is reasonable, is well established as a matter of State law in Colorado. Priority Reply at unp. 6 (quoting *Hepp v. United Airlines, Inc.*, 540 P.2d 1141, 1143 (Colo. App. 1975)).

²⁰ ONRR also asserts, at page 2 of its Sur-Reply, that the terms and conditions of the Assignment/Amendment "supersede the 1984 [M]inerals [A]greement." While the Assignment/Amendment provided for amendment of the Agreement, we are not persuaded that such amendment, either explicitly or implicitly, eliminated or altered the contractual limitations period in Section 18 of the Agreement.

or the Secretary files a specific exception, and providing further, the right of audit for any account as to which no exception has been filed will terminate seventy-two (72) months after the date of submittal.

Minerals Agreement at 14 (emphasis added). Also, Section 21 of the Agreement, which governs the transfer of interests under the Agreement, provides that the terms and conditions are binding on any transferee of WPC, either an affiliated entity, subject to prior notification to the Tribe, or a non-affiliated entity, subject to prior approval by the Tribe and the Secretary. *See id.* at 15 (“Any transferee from [WPC] will assume and agree to be bound by the applicable provisions of this Agreement attributed to the interest transferred.”).

We agree that the Minerals Agreement, originally entered into by WPC and the Tribe, with BIA’s approval, primarily invested WPC with the exclusive right to explore for, drill for, extract, remove, and dispose of all oil and gas from the affected lands, subject to the terms and conditions of the Agreement. It is also undisputed that JTD succeeded to the interest of WPC, under the Agreement. In addition, it is undoubted that the provisions of the Agreement, including the limitations period, were contractually binding on the parties thereto, which would include the United States, were it a party to the Agreement. *See, e.g., De-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 640-41, 641 (Fed. Cir. 1989) (“The United States can enforce the . . . agreement to[] a given [contractual] limitations period with the same force as a private party, notwithstanding its superior bargaining power.”); *United States v. Chicago, R.I. & P.R. Co.*, 200 F.2d 263, 264-65 (5th Cir. 1952) (citing *United States v. Seaboard Air Line Railway Co.*, 22 F.2d 113, 116 (4th Cir. 1927) (“We know of no principle of law under which the government, after receiving the benefits of a contract into which it has lawfully entered, can repudiate the conditions upon which the contract was made”)); *United States v. Framen Steel Supply Co.*, 435 F. Supp. 681, 683 (S.D.N.Y. 1977) (“[T]he United States as a party can adopt a contractual statute of limitations.”). Further, we note that the Agreement provides that each of WPC’s monthly royalty accounts will be deemed correct, and thus no longer subject to audit, unless the Tribe or the Secretary filed a specific exception, challenging the account, within 72 months after WPC submitted the account. Therefore, the Agreement clearly provided that, as between the parties thereto, the monthly royalty accounts submitted by WPC (or its successor-in-interest) would be deemed correct if unchallenged within 72 months of submittal of any account to the Tribe and BIA.²¹

²¹ JTD argues it is unclear exactly when it might be said that the Tribe or Secretary filed a “specific exception,” thus establishing the 72-month cut-off for challenges to the correctness of monthly royalty accounts with respect to production under the Leases. It notes that, if the Tribe’s Dec. 14, 2009, Issue Letter or ONRR’s May 4, 2010, Order to

(continued...)

However, while the Minerals Agreement was binding between JTD, as WPC's successor-in-interest, and the Tribe, as the named parties to the Agreement, we find nothing in the Agreement that bound ONRR, or, indeed, the Secretary or the United States. See Minerals Agreement, § 1 (Parties), at 1-2. Neither ONRR, the Secretary, nor the United States was a named party to the Agreement. Rather, the Secretary only acts "as approving authority and supervisor through his designated representatives." *Id.* at 2.

Nor are we persuaded that ONRR, the Secretary, or the United States, as a matter of law, is subject to the contractual limitations of the Agreement because it or she is an "agent and trustee for the Tribe," or specifically approved the Agreement, which approval was necessary to the validity and enforceability of the Agreement, or supervises performance under the Agreement. Priority Reply at unp. 6; see JTD Reply at 3-4 (citing *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1459 ("The enforceability of IMDA agreements between tribes and mineral developers is entirely dependent on the approval of the Secretary."), 1459-60 (9th Cir. 1986)). None of these roles or activities renders ONRR, the Secretary, or the United States a party to the Agreement. See *Garreaux v. United States*, 544 F. Supp. 2d 885, 896 (D. S.D. 2008) ("While it is true that the BIA approved the lease [of Indian lands from the Indian landowner to the Indian housing authority] and administered the lease agreement, these actions do not equate to making it a party to the lease or create any specific duties to the plaintiff. The BIA is simply fulfilling its fiduciary obligations to the Indian landowner."); *Chevron U.S.A. Inc.*, 130 IBLA 1, 3 (1994) ("Contracts entered into by an Indian tribe and approved by the Secretary are subject to the same rules of interpretation as are contracts between private parties."); *Asarco Inc.*, 116 IBLA 120, 126 ("The primary function of contract interpretation is to ascertain the intent of the parties."), 127-28 ("The submissions by the parties indicate that ASARCO and the Papago[] [Indians] apparently had different understandings of the meaning of paragraph V.A(5) [of the Settlement Agreement, approved by the Secretary,] from its inception. The courts have held that 'where there is a mutual misunderstanding as to a contract

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Report were deemed to constitute a specific exception, ONRR would be precluded from challenging monthly royalty accounts, respectively, prior to December 2003 or prior to May 2004. JTD indicates that ONRR's 2010 Order to Report is likely to be deemed a specific exception, since the Tribe's 2009 Issue Letter was said to be a "preliminary determination," and thus was "generalized and not specific." Answer at 9 (quoting Issue Letter at 2). We need not resolve this question, since we hold that the Minerals Agreement did not bind ONRR.

term, the court will rule against the party bearing the burden of proof.’ *United Steelworkers of America v. North Bend Terminal Co.*, 752 F.2d 256, 261 (6th Cir. 1985). In this case, ASARCO, as the party appealing [BIA’s] decision, has the burden of proving that decision is erroneous. . . . This it has failed to do. We therefore conclude that [ONRR] correctly construed paragraph V.A(5) and affirm the decision requiring the payment of additional minimum royalties.” (1990) (emphasis added).

The Secretary is required, upon the request of an Indian tribe, to assist the tribe “during the negotiation of a Minerals Agreement.” 25 U.S.C. § 2106 (2012). Further, section 3(a) of the IMDA, 25 U.S.C. § 2102(a) (2012), provides that an “Indian tribe, subject to the approval of the Secretary[,] . . . may enter into any . . . agreement (hereinafter referred to as a ‘Minerals Agreement’) providing for the exploration for, or extraction, processing, or other development of, oil[] [or] gas . . . in which such Indian tribe owns a beneficial or restricted interest[.]” (Emphasis added.) Thus, it is the Indian tribe that enters into the Agreement, with the Secretary’s approval. In that regard, the Secretary’s role is to ensure, in accordance with section 4(b) of the IMDA, 25 U.S.C. § 2103(b) (2012), that the Agreement is “in the best interest of the Indian mineral owner,” “does not have adverse cultural, social, or environmental impacts sufficient to outweigh its expected benefits to the Indian mineral owners,” and “complies” with all applicable Federal law.²² 25 C.F.R. § 225.22(c). Further, the Secretary may approve “alternate provisions” in a minerals agreement “[t]o the extent *the parties* to a minerals agreement are able to provide reasonable provisions satisfactorily addressing the issues or functions governed by the [ONRR] regulations relating to valuation of mineral product, method of payment, accounting procedures, and auditing procedures[.]” 30 C.F.R. § 225.6 (emphasis added).

Therefore, since the United States, acting on behalf of the Tribe, is not a party to the Minerals Agreement, it is not bound by its terms. *See, e.g., Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (“It goes without saying that a contract cannot bind a nonparty.”).

²² Priority asserts that ONRR is bound by the contractual limitations on royalty claims because “**both** the Tribe and the United States Government could agree to modify the limitations period[.]” Reply at 7 (emphasis added). Certainly, the Tribe, as a party to the Agreement, could so agree. However, the United States could not so agree. Its role is restricted to determining only whether such an agreement is in the best interests of the Tribe, and otherwise appropriate for approval by the Secretary, under 25 C.F.R. § 225.22(c).

Were we to hold otherwise, we would render ONRR unable to collect additional royalties properly deemed to be due and owing for the entirety of the August 2000-September 2009 production period, in accordance with the requirements of the applicable regulations. Section 20 (Regulations) of the Minerals Agreement provides that “[WPC] shall abide by and conform to any and all regulations of the Secretary which this Agreement may be subject to,” recognizing, however, that “the unique nature of this Agreement may cause the application of certain regulations to alter the intent of this Agreement, and in such event, the parties shall use their best efforts to jointly limit the effect of such regulations.”²³ Minerals Agreement at 15 (emphasis added). The Agreement, thus, generally incorporates the applicable regulations, but accords priority to the language of the Agreement, when expressly in conflict with the regulations. See 30 C.F.R. §§ 206.101 (“Lease”) and 206.170(b) (“If the specific provisions of any . . . Indian oil and gas lease are inconsistent with any regulation in this subpart [30 C.F.R. Part 206 (Product Valuation), Subpart E (Indian Gas)], then the . . . lease will govern to the extent of that inconsistency”) (2009); *Harken Southwest Corp.*, 153 IBLA 153, 159 (2000) (“To the extent of any inconsistency between the 1987 [Minerals] Agreement and the Federal regulations pertaining to product valuation for royalty computation, the [A]greement controls”), 160-61 (Minerals Agreement constitutes a “lease”). However, we have long held that we will read a Minerals Agreement, entered into by an Indian tribe and a private company, which incorporates the applicable regulations not expressly inconsistent with its terms, in a manner *that avoids placing it in conflict with the applicable regulations governing the computation and payment of royalties owed the tribe.* See *Harken Southwest Corp.*, 153 IBLA at 159-60, 161-62.

In the present case, the Minerals Agreement binds only the named parties, thus leaving the regulatory agency (ONRR) free to ensure full compliance with the royalty requirements of the applicable regulations. This understanding comports with and gives effect to 30 C.F.R. § 206.170(d) (2009), which provides that “[a]ll royalty payments you make to [ONRR] are subject to monitoring, review, audit, and adjustment.” (Emphasis added.) Above all, such analysis gives full rein to ONRR’s obligations under the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701-1758 (2012), with respect to the computation and payment of royalties to Indian tribes. See, e.g., 30 U.S.C. §§ 1701(a) (2012) (“Congress finds that . . . the

²³ The Agreement noted that the requirement to abide by the Department’s regulations, both now and hereafter in force, was subject to certain named exceptions (e.g., royalty rate, definition of paying quantities, etc.), with respect to the latter category of regulations, which, in order to be effective, must be approved, in writing, by WPC and the Tribe. See Minerals Agreement, § 20, at 5.

Secretary should aggressively carry out [her] trust responsibility in the administration of Indian oil and gas.”), and 1711(a) (“The Secretary shall establish a comprehensive . . . system to provide the capability to accurately determine oil and gas royalties, . . . and to collect and account for such amounts in a timely manner”) and (c) (“The Secretary shall audit and reconcile, to the extent practicable, *all* current and past lease accounts for leases of oil or gas and take appropriate actions to make additional collections . . . as warranted.”) (emphasis added).

[2] In sum, ONRR is not precluded by the contractual limitations in a minerals agreement entered into by an Indian oil and gas lessee and an Indian tribe, which had been approved by the Secretary of the Interior, from requiring the lessee to pay additional royalties owed on natural gas production more than 72 months after the submittal of each monthly royalty accounting to the tribe and BIA, absent the timely filing of a specific exception by the tribe or BIA, because the contractual preclusion of the collection of any additional royalty after that time frame was binding on the tribe, but not ONRR, since it was not a party to the agreement. Therefore, where ONRR later determined, even after the 72-month period following the submittal of any monthly royalty account, that the royalty had been miscalculated under the applicable regulations, and thus additional royalties were properly owed, it was not precluded, by Section 18 of the Minerals Agreement, from requiring payment of the royalties. See ONRR Answer at 4-5.

3. Whether ONRR is Equitably Barred from Collecting Additional Royalties

JTD argues that ONRR’s May 2010 Order to Report was erroneous because ONRR is precluded, as a matter of equity, from requiring the payment of additional royalties, by reason of JTD’s longstanding reliance on BLM’s 1992 approval of OLM, which was not disputed by the Tribe for 17 years and was even officially accepted by the Tribe in 2010, and, later, when Priority entered the picture, by reason of the Tribe’s affirmative concealment from Priority of its acceptance of the BLM-approved OLM, as the basis for royalty computation. Indeed, JTD states that the “entire dispute” stemmed from the Tribe’s “insistence upon using the Wellhead meter volumes for royalty purposes, when [it] knew or should have known these were not the correct volumes to use because the BLM had approved of the OLM in 1992.” Answer at 9. It explains that JTD’s reliance on OLM as the proper basis for royalty computation has been to its detriment, since, by virtue of the Tribe’s concealment of the propriety of JTD’s reliance on OLM from Priority, it has been “negatively impacted,” “as evidenced by the Lawsuit.” *Id.* JTD indicates that the Tribe’s concealment of BLM’s approval of OLM wrongly led Priority to believe that JTD had incorrectly computed royalty throughout the August 2000-September 2009 production period, in an effort to convince Priority to pay the additional royalties owed, which effort, ultimately, resulted in Priority’s suit against JTD, seeking compensation for any additional royalties Priority may be made to pay for JTD’s error. See *id.* at 10.

JTD principally concludes that, as a result of all these circumstances, ONRR is “*equitably estopped* from claiming royalties based on the Wellhead meter volumes.” Answer at 9 (citing *Linmar Petroleum Co.*, 153 IBLA 99, 106-07 (2000)) (emphasis added). JTD also states that ONRR is barred by reason of the equitable/legal doctrines of acquiescence and ratification, laches, and waiver from claiming that JTD failed to properly pay royalty on production during the August 2000-September 2009 period. *See id.* at 10.

JTD relies on the doctrine of equitable estoppel, in asserting that ONRR is estopped from requiring the payment of any additional royalties by reason of the fact that JTD relied, to its detriment, in calculating and paying royalties, on BLM’s approval of the OLM point, which was effectively confirmed, but later repudiated, by the Tribe, where the approval by BLM and confirmation by the Tribe were concealed from Priority. However, *since we are not persuaded that BLM’s 1992 approval of OLM had any bearing on the computation of royalty for gas produced from the Leases now at issue*, we find no basis for concluding that any reliance by JTD on BLM’s approval and the Tribe’s acceptance of the BLM-approved OLM or any succeeding affirmative concealment from Priority of the Tribe’s acceptance of the BLM-approved OLM, even if it occurred, estopped ONRR from recomputing the royalty owed and requiring the payment of additional royalties on production during the August 2000-September 2009 period. Nor are we persuaded that ONRR is otherwise prevented, as a matter of equity or law, from requiring the payment of additional royalties.

We turn now to adjudication of Priority’s appeal from the Director’s October 2012 decision.

B. Merits of Appeal by Priority

Priority argues that it is not liable for any of the additional royalties originally owed by JTD with respect to production from the Leases, during the period from August 2000 through September 2009, since it had entered into the assignment of the Leases “under the belief that all prior outstanding royalties had been paid.” NA/SOR at 2. It thus concludes that it is “wholly inequitable” for ONRR to now require Priority to pay such additional royalties. *Id.* at 10.

Priority states that it first learned that JTD’s royalty accounts were being audited by the Tribe on March 12, 2008, following execution of the Purchase Agreement on February 19, 2008, under which it agreed to an assignment of the Leases from JTD, effective February 20, 2008. *See* NA/SOR at 2, 4, 8. It acknowledges that it became aware, at that time, that JTD might owe additional royalties, and states that, in early 2009, the Tribe indicated to Priority that it would not approve assignment of the Leases “until the underpayment issue was satisfactorily resolved.” *Id.* at 8, 9.

Priority states that, on or about April 24, 2009, during the period prior to the Tribe's approval of the assignment, the Tribe required JTD to pay additional royalties; that JTD, in turn, required Priority, in accordance with the Purchase Agreement, to share in the royalty obligation; and that, together, they paid the full amount owed, totaling \$156,446.36 (JTD (\$131,968.95) and Priority (\$24,477.41)). See NA/SOR at 4, 9. Priority asserts that, until ONRR issued the May 2010 Order to Report, it believed the obligation to pay additional royalties was fully satisfied for the following reasons: Although Priority met with the Tribe "numerous times" prior to the Tribe's November 10, 2009, approval of the assignment of the Leases, it was never informed that JTD owed additional royalties; the Tribe approved the assignment, following the \$156,446.36 payment, "*leaving Priority to believe that no further claims [for additional royalty] would arise.*" *Id.* at 9 (emphasis added). And when, in a December 14, 2009, letter, the Tribe notified JTD that JTD owed even more royalties, Priority was not copied. NA/SOR at 4.

ONRR, Priority claims, should have disclosed this debt, before Priority's decision to proceed with the assignment, especially since the total royalty that was still owed (\$320,897.85) approximated Priority's purchase price for the Leases (\$575,000), and "subverted the economics of developing . . . the Leases." *Id.* Priority claims further inequity in ONRR's order to pay additional royalties owed for production occurring prior to the effective date of assignment of the Leases, since JTD, not Priority, received the revenues derived from that production. See NA/SOR at 9.

1. *Whether ONRR is Equitably Barred from Collecting Additional Royalties from Priority*

Priority does not articulate any specific doctrine in support of its assertion that ONRR is equitably barred from collecting additional royalty with respect to production from the Leases prior to the effective date of the assignment of the Leases. However, its argument suggests that Priority believes we should determine ONRR equitably estopped from collecting such royalties.

[3] Estoppel is considered an extraordinary remedy when applied against the United States, and the legal hurdles to be overcome are considerable. See, e.g., *Tekxon Onshore Oil & Gas, LLC*, 184 IBLA 134, 143 (2013); *Jack C. Scales*, 182 IBLA 174, 180 (2012). The party seeking estoppel must first establish that the four basic elements of estoppel have been met: (1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his/her conduct shall be acted on or must so act that the party asserting estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped.

Terra Resources, Inc., 107 IBLA 10, 13 (1989) (citing *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970)). In addition, estoppel must be based upon affirmative misconduct, such as an affirmative misrepresentation or concealment of material facts by a Federal agency, upon which the party asserting estoppel detrimentally relied. See *United States v. Ruby Co.*, 588 F.2d 697, 703-04 (9th Cir. 1978); *Terra Resources, Inc.*, 107 IBLA at 13. Furthermore, the crucial misstatement must be *in writing*. *Santa Fe Minerals, Inc.*, 145 IBLA 317, 324 (1998); *David E. Best*, 140 IBLA 234, 236 (1997) (citing *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 65 (1984)). Finally, while estoppel may lie where failing to do so deprives the party of a right he would have legally acquired had he not relied on the Federal agency, *it will not lie where to do so would grant the party a right not authorized by law*. See 43 C.F.R. § 1810.3(b) and (c);¹⁴ *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. at 60-63; *Terra Resources, Inc.*, 107 IBLA at 13. Applying these legal conditions, we do not find that estoppel is applicable here.

We agree that, during the period leading up to the January 11, 2010, approval of the assignment of the Leases from JTD to Priority, ONRR likely could have determined that JTD owed even more royalties with respect to production from the Leases during the period from August 2000 through September 2009. Indeed, ONRR reached that determination shortly thereafter, in issuing the February 2010 Order to Report to JTD, followed by the May 2010 Order to Report to Priority, and the Tribe earlier reached that determination in its December 2009 Compliance Review Issue Letter. We also understand that Priority may not have known, throughout the period leading up to the January 11, 2010, approval of the assignment, that JTD owed even more royalties with respect to production from the Leases during the period from August 2000 through September 2009. Moreover, we also are aware that Priority might have declined to enter into the February 2008 Purchase Agreement, or revoked its agreement prior to ONRR's approval of the assignment of the Leases on January 11, 2010, had it been aware that ONRR had determined JTD owed additional royalties.

However, the fact that Priority interpreted the lack of information regarding additional royalties owed in a way that “[le]ft Priority to believe that no further claims

¹⁴ 43 C.F.R. § 1810.3 provides, in subsection (b), that “[t]he United States is not bound or estopped by the acts of its officers or agents when they enter into an arrangement or agreement to do . . . *what the law does not sanction or permit*,” and, in subsection (c), that “[r]eliance upon information or opinion of any officer, agent or employee . . . cannot operate to *vest any right not authorized by law*.” (Emphasis added).

would arise” does not satisfy Priority’s burden to demonstrate affirmative misconduct by ONRR or the Tribe or their written misrepresentation to the effect that JTD had fully paid all royalties with respect to production from the Leases, upon which Priority relied to its detriment, as required to succeed with a claim against the Government for estoppel. NA/SOR at 9. As we stated in *Supron Energy Corp.*, 46 IBLA 181, 189 (1980): “In the absence of *[express] acceptance* of the lessee’s statement of [production] value as conclusive *by any official authorized to bind the Department contractually*, the Department is not barred from rejecting this statement as incorrect, determining value by another acceptable method, and demanding payment of royalty based on this method.” (Emphasis added).

Here, since we have no express acceptance or other approval by ONRR of the production volumes originally used by JTD to compute royalty as conclusive, ONRR is not barred from recalculating the royalties owed based on the correct production volumes, and demanding payment of additional royalty. See *Eighty-Eight Oil Co.*, 115 IBLA 386, 390-91 (1990). Moreover, were we to equitably estop ONRR from collecting additional royalties from Priority, we would be acting in contravention of 25 C.F.R. § 211.53(c) (2000), which provides that the assignee (Priority) accepts all of the “prior obligations and liabilities of the assignor [JTD],” including “underpaid royalties[.]” We would thus grant Priority a right, the right not to assume JTD’s “prior obligations and liabilities,” to which it is not entitled as a matter of law, which is strictly prohibited.

In conclusion, Priority, as an Indian oil and gas lessee, is not entitled to avoid paying additional royalties owed on production prior to the effective date, as between the parties, of the assignment, by which it acquired the lease, because it agreed to the assignment under the good faith belief that the assignor (JTD) had paid all the royalties properly deemed to be owed on production. Nor is ONRR equitably estopped from collecting the additional royalties owed where there is no evidence that the lessee relied on an affirmative written misrepresentation or concealment of material fact by ONRR, regarding the status of the royalty account, at the time of approval of the assignment, and where, in any event, allowing the lessee to avoid its royalty obligation would afford it a right not authorized by law.

2. *Whether Priority is Liable for Additional Royalties
Owed Prior to Effective Time*

Next, Priority states that the assignment of the Leases from JTD to Priority occurred on February 20, 2008, pursuant to the February 19, 2008, Purchase Agreement, which clearly placed all responsibility for any outstanding royalties as of February 20, 2008, on JTD, as the “Seller.”¹⁵ The Purchase Agreement generally provided, in Section 1.3, that, in addition to being “entitled to any production revenues or other amounts realized from and accruing to the Assets up to the Effective Time,” “Seller . . . shall be liable for the payment of all costs and expenses attributable to the Assets . . . up to the Effective Time[.]”¹⁶ The Agreement also provided that “[c]onsummation of the purchase and sale transaction,” presumably when “[p]ossession” of the Leases would be transferred from JTD to Priority, would occur on a “Closing Date,” which was not specified. Purchase Agreement, §§ 1.3, 4.1, at 2, 5; *see id.*, Article VII (*Conditions to Closing*), at 10-11 (emphasis added); Purchase Agreement at 2. Excepted from the Seller’s liability were “any expenses attributable to obligations assumed by Purchaser in Section 9.2.”¹⁷ *Id.* (emphasis added). Section 9.2, in turn, provided, in subsection (a), that

¹⁵ Priority states that, even after the assignment was effective between the parties on Feb. 20, 2008, in accordance with the Purchase Agreement, pending approval of the assignment, JTD continued to exclusively operate and produce the Leases, paying all royalties deemed to be due, until Jan. 11, 2010, when the assignment became effective vis-a-vis the Tribe and the United States, following its approval by the Tribe and BIA. *See* NA/SOR at 9-10.

¹⁶ The “Assets” included the Leases, and other properties not now at issue. *See* Purchase Agreement, § 1.2, at 1-2, Exhibit A. The “Effective Time” was defined as the time when the transfer of “ownership,” but not “[p]ossession,” of the Leases would be effective between JTD and Priority, in accordance with the Agreement, which was 12:01 a.m. on Feb. 20, 2008. *Id.*, § 1.3, at 2; *see id.*, § 4.1, at 5 (“The Conveyance shall be effective as of the Effective Time”).

¹⁷ In Section 9.1, the Purchase Agreement provided:
[A]ll costs, expenses, disbursements, obligations and liabilities attributable to the Assets for periods of time up to the Effective Time, regardless of when due or payable, shall be the sole obligation of Seller and Seller shall promptly pay, or if paid by Purchaser, promptly reimburse Purchaser for and hold Purchaser harmless from and against same. Purchase Agreement at 12 (emphasis added). The allocation of

(continued...)

Purchaser assumes all obligations that are attributable to the Assets from and after the Effective Time including, but not limited to, any obligation to cash balance or to allow third parties to make-up gas according to the terms and conditions of the applicable gas balancing or other contracts or governing law, rule or regulation, all obligations to properly plug and abandon all wells now or thereafter located on the Leases and restore the surface of the Leases in accordance with applicable lease or other agreements and governmental . . . laws, orders, and regulations (regardless of whether any such obligation to plug, abandon and restore is attributable to periods of time prior to or after the Effective Time) and the obligation to pay ad valorem, similar production taxes and property taxes with respect to the Assets[.]

Id. at 12 (emphasis added). Finally, in Section 5.11, JTD warranted that, “[t]o the actual knowledge of Seller, . . . all royalties . . . due under the Leases which are the responsibility of Seller to pay have been fully, properly and timely paid[.]” *Id.* at 8.

Priority concludes that, since Section 9.2 did not explicitly provide that it assumed the Seller’s obligation to pay additional royalties deemed to be owed on production that occurred prior to the effective date of the assignment under the Purchase Agreement, which thus remained the obligation of the Seller, it is not liable for such royalties. See NA/SOR at 3. Priority states that, since February 20, 2008, represents the effective date of the assignment under the Purchase Agreement, JTD owes underpaid royalties, totaling \$204,454.56 of the total amount of underpaid royalty (\$320,897.85), which had accrued with respect to production from August 2000 through February 2008, and Priority owes underpaid royalties, totaling \$116,443.28, that had accrued with respect to production from March 2008 through September 2009. See *id.* at 4-5.

[4] We will not interpret a contract between private parties purportedly allocating their respective obligations to pay Federal royalties, when the United States is not a party to the agreement. We look instead to the language of the applicable regulation and the terms of any agreement approved by the United States, which controls the private party(ies) obligations vis-a-vis the United States. Accordingly, we will not here determine whether the Purchase Agreement allocated the obligation to

(...continued)

responsibility for such obligations and liabilities was “[e]xcept as otherwise provided in this Agreement[.]” *Id.*

pay the additional royalties in the manner envisioned by Priority, because the Agreement, to which the United States was not a party, can not undermine the effect of the regulation at 25 C.F.R. § 211.53(c) (2000), or the terms of the assignment of the Leases approved by the Tribe and BIA, which control Priority's obligations vis-a-vis the Tribe and the United States.¹⁸ See, e.g., *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. at 294. We look instead to the assignment, approved by the United States, and to Federal contract law to interpret the assignment because contracts approved by the Secretary are subject to the same rules of interpretation as are contracts between private parties. See *Asarco Inc.*, 116 IBLA 120, 126 (1990). A primary task of contract interpretation is to ascertain the intent of the parties from the language of the contract and the circumstances under which it was made by giving contract provisions their natural and most commonly understood meaning. *Gibbs v. Air Canada*, 810 F.2d 1529, 1533 (11th Cir. 1987). The plain and unambiguous meaning of a written agreement controls unless there is clear evidence of contrary intent. *Pennsylvania Ave. Development Corp. v. One Parcel of Land in D.C.*, 670 F.2d 289, 292 (D.C. Cir. 1981). As indicated above, in his October 2012 decision, the Director interpreted the assignment and 25 C.F.R. § 211.53(c) (2000) to provide that the assignee assumed all of the outstanding obligations of the assignor upon the effective date of the assignment.¹⁹ We agree.

The regulation at 25 C.F.R. § 211.53(c) (2000) provides that an "assignee accepts all the assignor's responsibilities and prior obligations and liabilities of the assignor (including, but not limited to any underpaid royalties and rentals)." Section 102 of the November 2009 Assignment/Amendment, executed by the Tribe and Priority, provides that, upon approval, Priority would "assume" JTD's "obligations unfulfilled as of the effective date of the assignment." Assignment/Amendment at 3; see Minerals Agreement, § 21, at 15 ("Any transferee from Wintershall will assume and agree to be bound by the applicable provisions of this Agreement attributed to the interest transferred."). In accepting the February 2008 Assignments of Mining Lease,

¹⁸ The Purchase Agreement is an agreement between private parties, and determination of its meaning and effect is a matter of New Mexico state law, which, as the parties are aware, may be resolved by negotiation or resort to a court of competent jurisdiction. See Purchase Agreement, § 10.6, at 14; see e.g., *Pat Reed*, 119 IBLA 338, 342-43 (1991).

¹⁹ The rule at 25 C.F.R. § 211.53(c) (2000) was promulgated effective Aug. 7, 1996. See 61 Fed. Reg. 35634, 35659-60 (July 8, 1996). It remained in effect as of the Feb. 20, 2008, effective date of the assignment of the Leases, as between JTD and Priority, and the Jan. 11, 2010, effective date of the assignment of the Leases.

Priority agreed to fulfill “all” the obligations, whether unfulfilled or to be fulfilled, in the Leases, “when assigned[.]” It also agreed to comply with the applicable regulations. The assignment became effective on January 11, 2010, with BIA’s approval of the Assignment/Amendment and Assignments of Mining Lease. The language of the two assignment documents properly conforms with and incorporates 25 C.F.R. § 211.53(c) (2000), and the language of these sources is controlling.

It is well established that, in determining the respective obligations of the assignor and assignee of a Federal or Indian oil and gas lease vis-a-vis the United States, for royalty payment or other purposes, the relevant date is not the effective date as between the parties, but rather the effective date as between the parties and the United States, acting alone or on behalf of an Indian tribe, as the approving authority. *See* 25 C.F.R. §§ 211.53(a) and 225.33 (2009); Minerals Agreement, § 21, at 15; *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 70 (1966); *Pan American Petroleum Corp. v. Gibbons*, 168 F. Supp. 867, 871-75 (D. Utah 1958), *aff’d*, 262 F.2d 852 (10th Cir. 1958); *Marlin Oil Corp.*, 158 IBLA 362, 367-68 (2003); *Cross Creek Corp.*, 131 IBLA 32, 37 (1994); *Jack Corman*, 119 IBLA 289, 291 n.3 (1991); *Ralph G. Abbott*, 115 IBLA 343, 346 (1990) *see also Pitch Energy Corp.*, 169 IBLA 267, 274 (2006). In the present case, once the assignments were approved by BIA, they became effective as between JTD, Priority, and the United States, and Priority became obligated to pay the outstanding royalties owed on production from the Leases. *See Marlin Oil Corp.*, 158 IBLA at 367 (“Under Federal law and regulations applicable to Federal and Indian oil and gas leases, lease obligations flow to the lease holder. . . . [A]fter approval to the transfer of record title to a lease by the authorized officer, an assignee is responsible for all lease obligations.”).

3. *Whether ONRR Properly Computed Additional Royalties Owed*

Finally, Priority argues that ONRR has “vastly overstate[d]” the royalties properly deemed to be due with respect to production from the Leases, during the period from August 2000 through September 2009. NA/SOR at 5. Priority purports to rely on documentation provided to it by JTD, which disclosed natural gas produced from the Leases, over the period from March 2008 through September 2009, and sold to WGR Asset Holding Company, LLC (WGR), the sole purchaser of gas during that time frame. Such documentation, which consists of check stubs and corresponding well statements (attached as Ex. D to NA/SOR), is said to reveal that ONRR’s royalty computations were based on production amounts considerably greater than what actually occurred. Priority concludes that the “documentation . . . plainly indicates that . . . the post-Effective Date production from the Leases is far less than that [assumed or] presumed by the [May 2010] Order.” *Id.* at 7; *see id.* at 5.

Priority alleges that, since ONRR has overstated production from the Leases over the period from March 2008 through September 2009, it must have also

overstated production over the period from August 2000 through February 2008. *See* NA/SOR at 7. However, Priority does not offer any substantiation for its allegation that ONRR has, in computing the additional royalties deemed to be owed, overstated production from the Leases over the period from August 2000 through February 2008.²¹ Priority regards itself as not liable at all for additional royalties owed for gas produced over that time period. However, in the absence of any convincing argument or supporting evidence establishing any error in ONRR's assessment of production over the period from August 2000 through February 2008, we conclude that ONRR properly computed the additional royalties owed for gas produced over that time period.

Although we focus on Priority's allegation that ONRR overstated production from the Leases over the period from March 2008 through September 2009, we think that our conclusion has broad application to the entire production period at issue. ONRR specified the production used in its royalty computations, with respect to the periods from August 2000 through March 2003 and from April 2003 through September 2009, as well as the source of its production information, in Enclosures 2 and 3 attached to the May 2010 Order to Report. Such sources generally included the production recorded at the wellhead, which was compared with the production determined by the Tribe, by auditing or reviewing the royalty accounts, or the production reported by JTD in its MMS-2014 forms. While it opted to use the higher of the production figures for royalty computation purposes, ONRR did not simply "assume[]" or "presume[]" the gas produced from the Leases over the period from March 2008 through September 2009. NA/SOR at 5, 7.

In the face of ONRR's evidence, Priority offers conflicting evidence, in the form of check stubs and corresponding well statements, which purport to reflect payments for production from the Leases, over the period from March 2008 through September 2009. However, it is not clear that this evidence reflects production from all of the Leases, for each of the months from March 2008 through September 2009. We also note that the production figures do not agree with any of the total production figures disclosed by ONRR for all of the Leases, for each of the months from March 2008

²¹ Priority asserts that, since it has failed to obtain any documentation from JTD, it seeks to obtain documentation from ONRR supporting ONRR's determination of the gas produced from the Leases over the period from August 2000 through February 2008, through the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012). *See* NA/SOR at 6-7. Priority stated that it expected to receive such documentation by "at least December of 2012[.]" *Id.* at 6. Priority has not updated the Board regarding the status of its FOIA request, or its efforts to obtain such documentation from "other third-parties[.]" *Id.* at 7 n.1.

through September 2009.² Priority offers nothing to explain this discrepancy. In any event, Priority fails to establish that its evidence, which represents the sale of production from the Leases, best reflects actual production from the Leases, for royalty computation purposes. We also note that Priority elsewhere states that it “has not been provided detailed records of . . . production from the Leases, and currently has no means to provide . . . production information for the period of August 2000 through February 12, 2012[.]” NA/SOR at 9-10. We thus conclude that Priority is less than sure regarding the accuracy of the production information disclosed by the check stubs and well statements.

Further, in bringing the civil complaint against JTD on January 28, 2013, shortly after filing its appeal on November 26, 2012, Priority’s claim for additional revenues for the period from March 2008 through December 2009 was directly based on its assertion that, in view of ONRR’s May 2010 Order to Report, it was clear that JTD had, following the February 20, 2008, effective date of the Agreement, as between the parties, failed to accurately report the actual amount of gas produced from the Leases: “*When compared with the production noted in the 2010 Order, the information provided to Priority indicates [JTD] failed to notify Priority of significant production from the Leases during the Pre-Approval Period. Moreover, [JTD] failed to remit the additional revenues to Priority.*” Original Complaint, *Priority v. JTD*, No. 1:13-cv-00091 KBM-RHS, dated Jan. 28, 2013, at 8-9 (emphasis added). Thus, at the same time that Priority was asserting in its appeal that the actual production was considerably less than that on which ONRR had based its royalty computations, Priority was asserting in its lawsuit that the actual production was exactly that on which ONRR had based its royalty computations. Priority added, in the complaint, that its receipt of the 2010 Order was “the first that it learned or could have learned of the deficiency as *Priority did not have the records relating to production on the Leases,*” further noting that “[JTD] maintained all records related to the Leases’ production prior to the Effective Time, and only provided limited information to Priority during the Pre-Approval Period.” *Id.* at 9 (emphasis added). In these circumstances, we are not persuaded that the check stubs and well statements suffice to overcome ONRR’s assessment of the state of production from the Leases, whether before or after February 20, 2008.

Priority seeks to establish that there is a fundamental flaw in ONRR’s methodology for determining the production of gas from the Leases, on which to base its royalty computations. It explains that, in determining production, ONRR relied on either “the ‘restated Wellhead Volume,’” which constituted the volume reported immediately following production at the wellhead, or “the volume reported on the MMS 2014 form[,]” which constituted the volume later reported to MMS on the MMS-2014 Form, but that, rather than regarding one source as an accurate and reliable source of information concerning production, ONRR “arbitrarily” selected the particular source that disclosed the highest production for any production month “in

every instance.” NA/SOR at 7, 8. Priority thus concludes that ONRR “does not attempt to determine what quantity of production is accurate, but instead only picks and chooses figures to ensure the maximum amount of royalty, regardless of accuracy,” and thus “virtually assures that it will find underpayment of royalties without regard for the truth.” *Id.* at 7, 8.

[5] The Indian Mineral Leasing Act of 1938, and its implementing regulations charges ONRR with maximizing the royalty return to the Tribe from the production of natural gas from Indian lands within the Ute Mountain Ute Indian Reservation, in satisfaction of the trust responsibility of the United States, acting through ONRR, to the Tribe. See 30 U.S.C. §§ 1701(a) and 1711 (2012); 25 C.F.R. §§ 211.6, 211.41(c), and 225.1(a) (2009); 30 C.F.R. §§ 202.550, 202.551, 202.555, and 206.175 (2009); *Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F.2d 782, 794 (9th Cir. 1986); *Blackfeet Tribe of Indians v. State of Montana*, 729 F.2d 1192, 1198-99 (9th Cir. 1984), *aff'd*, 471 U.S. 759 (1985) (“The Senate Bill was enacted as the Act of May 11, 1938 The Senate Report accompanying the bill noted that its purposes were to obtain uniformity with respect to the leasing of tribal lands, give Indians authority in granting or denying leases, and *enable the Indians to gain the greatest return from their property*. S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937).” (emphasis added)); *Merrion Oil & Gas Corp.*, 147 IBLA 258, 263-64 (1999).

Moreover, in adopting, as modified, the dissenting opinion of Judge Seymour in 728 F.2d 1555, 1563 (10th Cir. 1984), the Federal circuit court specifically stated, in *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857 (10th Cir.), *modified on other grounds*, 793 F.2d 1171 (10th Cir.), *cert. denied*, 479 U.S. 970 (1986), as follows: “Given two reasonable interpretations [of the Department’s royalty valuation regulations], Interior’s trust responsibilities require it to apply *whichever accounting method* (BTU or net realization) *yields the Tribe the greatest royalties*.” 728 F.2d at 1569 (emphasis added); *see id.* at 1565 (“The evident purpose of the [Indian Mineral Leasing Act of 1938] is to ensure that Indian tribes receive the maximum benefit from mineral deposits on their lands through leasing”), 1566-69.

Therefore, the Board will deem ONRR to have properly computed the additional royalties owed with respect to natural gas produced from an Indian oil and gas lease where the lessee fails to establish, by a preponderance of the evidence, any error in the royalty computation. The lessee fails to establish any error in ONRR’s decision to use the higher of the production recorded by the lessee at the wellhead and the production reported by the lessee on the applicable government form in determining the amount of natural gas produced from each of the wells on the lease, where no evidence is presented demonstrating that the production volumes were not accurately recorded or reported, the higher figure did not represent actual production, or ONRR otherwise

violated its obligation to ensure the greatest return to the tribe for production from Indian lands.

Here, when presented with two reasonable production volumes, ONRR was bound to adopt the volume that resulted in the greatest return to the Tribe. We find, no dispositive evidence that ONRR miscalculated the production figures either at the wellhead, as audited or reviewed by the Tribe, and/or as reported by JTD in its MMS-2014 forms. Clearly, where, in each case, the two figures, which were compared by ONRR, diverged, there could be only one accurate figure. However, ONRR concluded, after comparing the two figures, that the higher figure represented the appropriate production volume for royalty computation purposes. *See Citation Oil & Gas Corp.*, 179 IBLA 390, 394, 396, 398 (2010) (MMS relied on State audit that adopted production figures from sales contracts or monthly reports of operations, which were higher than figures reported in MMS-2014 forms, in assessing additional royalties); *Harvey E. Yates Co.*, 135 IBLA 373, 377 (1996) (“BLM clearly has the jurisdiction to determine whether the total amount of production, reported for royalty computation purposes, is accurate”). Having done so, the burden fell to Priority to establish error: “[T]he party challenging a royalty valuation by MMS has the burden of showing that the agency’s method of [royalty] calculation is in error.” *Citation Oil & Gas Corp.*, 179 IBLA at 399.

We are not persuaded that ONRR improperly relied on the higher production figures in its royalty computations. *See Citation Oil & Gas Corp.*, 179 IBLA at 404-05 (Lessee/operator failed to carry burden to demonstrate error in MMS’ determination of under-reporting of oil production); *Cudd Operating Corp.*, 176 IBLA 192, 204 (2008) (“[Operator] has presented no basis for reversing MMS’ reliance on the reported volumes and values [of gas produced from Indian leases]”); *Crawley Petroleum Corp.*, 140 IBLA 216, 219-20 (1997) (Operator failed to carry burden to demonstrate error in BLM’s determination of under-reporting of oil production); *Robert L. Bayless*, 138 IBLA at 221-22 (Operator carried burden, in the face of BLM rescission of approval of surface commingling and OLM plan because of likely under-reporting of gas production, of demonstrating accuracy and reliability of plan in measuring Indian lease production). Moreover, we think that, by relying on such figures, ONRR fulfilled its trust obligation to the Tribe.

We, therefore, conclude that, in his October 2012 decision, the Director properly denied Priority’s appeal from ONRR’s May 2010 Order to Report and Pay Additional Royalties, in the total amount of \$320,897.85, with respect to natural gas produced from the Leases, over the period from August 1, 2000, through September 30, 2009.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, JTD's motion for a hearing is denied, and the decision appealed from is affirmed.

_____/s/
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/
James F. Roberts
Administrative Judge